

ESTTA Tracking number: **ESTTA594549**

Filing date: **03/25/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85726368
Applicant	WGI Innovations, Ltd.
Applied for Mark	FUZE
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Attachments	Fuze Reply Brief.pdf(543615 bytes)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In Re: WGI Innovations, Ltd.

Application Serial No. 85/726,368

Mark: FUZE

APPLICANT'S REPLY BRIEF

Applicant respectfully addresses several arguments in the Examining Attorney's Appeal Brief.

One such argument, in the context of similarity of the marks, is that similarity in sound alone may be sufficient to support a finding that the marks are confusing similar and cites *In re 1st USA Reality Prof'ls, Inc.* 84 USPQ2d, 1581, 1586 (TTAB 2007). The *1st USA Reality* case is distinguishable because the Board found that the marks were used on services (real estate brokerage, banking, financial investment) recommended by word of mouth. In other words, in the *1st USA Reality* case, sound was an important factor because that is how many customers perceived the marks. There is no such evidence in the subject application. In fact the evidence is to the contrary, that customers perceive the marks visually, not orally (see unnumbered Exhibit-screen shot of website of Reference Mark; see also the evidence that Applicant has objected to, namely the Walmart web pages, the Cabella's web page and the other pages which show visual, not oral, perception of the marks). The Examining Attorney also cites TMEP §1207.01(b)(iv) which states, "similarity in sound is one factor..." (emphasis supplied).

The Examining Attorney is in error in stating, "In addition, the applicant believes the design element in the registrant's mark is the dominant feature of that mark." The correct statement is, "Because of the left to right reading arrangement (where the logo is to the left of the letters) and the use of letters, it cannot be said that the word element is dominant." (The parenthetical expression is added to the quotation). In other words, because of the unique and eye-catching design and the interaction of the design with the word and lettering, neither the design nor the word are dominant; each supports the other.

This evidence directly rebuts the Examining Attorney's position that the word portion generally may be dominant. The unique design element of the Reference Mark leads to a different commercial impression than Applicant's mark and cannot be ignored.

Regarding the relatedness of the goods, the Examining Attorney cites *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975) to support the proposition that the goods need not be directly competitive. However, the *Safety-Kleen* case was decided under the old statute 15 U.S.C. §1052(d). Applicant's brief cites *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 716, 717 (Fed. Cir. 1992), which addresses how the 1988 amendment to 15 U.S.C. §1052(d) deleted "purchasers". The court said it was error to deny the registration on the basis of relatedness of goods and services simply because the Applicant sold some of its goods in some of the same fields in which the Opposer provided its services, without determining who the relevant persons (or purchasers) were. The court said this was especially true where the goods and services were

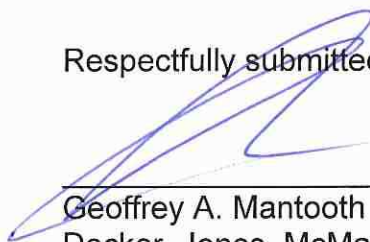
specifically different and non-competitive, as in this instant case. The *Electronic Design* case is the more recent and relevant of the two and takes precedent over the *Safety-Kleen* case regarding this particular issue.

In the *Electronic Design* case, the court looked not to merely theoretical possibility of confusion, but rather the practicality of the commercial world. The evidence is clear in this case that game scouting cameras are different from, unrelated to, and do not compete with the goods of the Reference Mark. In addition, as shown by the evidence regarding who the relevant purchasers are (the forums and customer discussion of game scouting cameras) show that customers are not looking for the goods of the Reference mark and are sophisticated enough to distinguish between game scouting cameras and the goods of the Reference Mark.

It is respectfully submitted that there is no likelihood of confusion between Applicant's mark and the Reference Mark. Applicant respectfully requests that the refusal be overturned and the application passed on to publication.

Dated: March 25, 2014

Respectfully submitted,



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